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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CLAYTON BAKER, as Executor, etc., Plaintiff and Appellant, v. NAWN et al., Defendants and Respondents.	B203315 (Los Angeles County Super. Ct. No. SC081719)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry Friedman, Judge. Reversed and remanded.

The Bucklin Law Firm, Stephen L. Bucklin for Plaintiff and Appellant.

Larry Haakon Clough for Defendants and Respondents.

The parties entered a purchase and construction agreement relating to two adjoining lots of undeveloped hillside property next to Will Rogers State Beach. The property owners (a couple in their seventies) agreed to sell one lot to Nawn, a Nevada corporation. As consideration for the sale, Nawn agreed to build a house for the sellers on the remaining lot. Title would not pass to Nawn until the project was complete. Seventeen years passed--and the sellers died--but no house was ever built, though efforts were made to discern the magnitude of the geological challenges presented by the landslide-prone building site.

The parties sued each other. The estate of the sellers wanted to quiet title and establish its right to both lots; Nawn wanted a division of the property. The trial court ordered the sale of the property, with the proceeds to be equally divided between Nawn and the sellers' estate. We reverse. Nawn agreed to build a house for the sellers per a specified plan and began performing the contract, but it lacks a California contractor's license. As a result, Nawn cannot recover in law or in equity. Further, the result is inequitable: the trial court rewarded Nawn with half of the property, even though the corporation failed to carry out its part of the bargain by building a house for the sellers.

FACTS

The Property

William and Kathleen Wingen owned unimproved property in Pacific Palisades, known as lots 4 and 5 of the Castellammare Tract (the Property), which they purchased in 1958 and 1960. The area is geologically unstable. The Property is situated on an active landslide. Over the years, Mr. Wingen hired various drilling companies and geological engineers, in an attempt to develop the Property. Experts who have worked on house projects in Castellammare testified that it takes 10 to 15 years to complete the building process.

In 1989, Mr. Wingen approached Gary Mamian, a civil engineer and contractor, as Mamian prepared to do exploratory drilling on lot 6 in the Castellammare Tract. Mr. Wingen said, "I own these two lots next door to you . . . and I would like to see if you can build me a house." Mamian prepared construction plans for the Wingens, for a 3,100-

square-foot house. When Mr. Wingen asked for a price, Mamian declined to give one because he did not know the condition of the soil or whether he could get a permit to build.

Mr. Wingen proposed a joint venture with Mamian, to reduce the cost of developing the plans. The initial soils report they obtained for the Property from a geologist was unfavorable, so Mamian and the Wingens knew it would take a long time to get a favorable geological report and city approval. Getting approval to build in Castellammare requires a favorable soils report, approval for building in a coastal zone, fire department approval, grading department approval, zoning approval, water and sewer approval, plus California Coastal Commission approval. Developers must also overcome neighborhood opposition.

The Purchase and Construction Agreement

At the core of this dispute is a two-page "Purc[h]ase and Construction Agreement" dated December 16, 1989 (the Agreement). The sellers were William and Kathleen Wingen. The buyer is listed in the preamble of the Agreement as "Nawn, a Nevada Corporation," but is listed at four other places in the Agreement--including the signature line--as "Nawn Corporation."[1] The Wingens agreed to sell lot 5 of the Property, and "in exc[h]ange buyer agrees to build a ± 3190 sq. feet [*sic*] house as per attached plans subject to City of Los Angeles Building Department approval and changes. Sellers shall pay a maximum of $ 75,000.00 (Seventy Five Thousand Dollars) in addition to the lot 5 for the completed house on lot 4."

For purposes of the transaction, the buyer and sellers agreed to form a Nevada company called "Oleander Corporation." Gary Mamian, and William Wingen would

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[1] The trial court ultimately found that the buyer is Nawn, a Nevada corporation. Appellant agrees with this finding. Gary Mamian is the president of Nawn. There is no proof that either Nawn Corporation or Nawn ever possessed a California contractor's license.

serve as president and vice-president of Oleander Corporation. They agreed to deposit $5,000 each into a corporate bank account to capitalize Oleander.

The Wingens opened an escrow for this transaction and transferred title to the Property to Oleander Corporation. The Agreement specifies that the transfer is made "with escrow instruction[s] stating that *upon completion of the projects*, the house on lot 4 shall be given to William and Kathleen Wingen and the house on lot 5 shall be transfered [*sic*] to Nawn corporation." (Italics added.) Escrow would be consummated when a grant deed was recorded and an Oleander Corporation bank account was opened and funded with $5,000 from the buyer and seller. The Agreement does not establish a time frame in which to complete performance.

The Agreement contains a cancellation clause. It provides that "Purchase and construction will be based upon buyer's and seller's authori[z]ed soil and geologists reports and tests which has [*sic*] been initiated by both parties['] approval as of December 9, 1989, which will be conducted by Solus Geotechnical Corporation . . . . If for some unseen or unexpected soil conditions and any action by the city of Los Angeles Building Department it becomes evident that development of these two lots 4 and 5 are [*sic*] economically or otherwise unfeasible by the buyer, at that time all expen[s]es or profits reali[z]ed on the development of these two lots shall be divided by both parties on the basis of 50/50 and the buyer has the right to cancell [*sic*] this agreement."

Oleander Corporation

Oleander Corporation (Oleander) was formed in Nevada in December 1989. According to the testimony, the Wingens and Gary Mamian were each issued 500 shares in Oleander. No shares were issued to Nawn. The purpose of creating Oleander was to avoid personal liability. Mamian testified that during excavation and caisson hole drilling, "someone could get hurt and you don't want your personal asset[s] to be involved in somebody suing you." For this reason, Mamian formed Nawn, and formed Oleander with the Wingens.

The Wingens and Mamian funded Oleander with $5,000 capital payments in January 1990. In 1991-1992, they infused additional money into Oleander. The money

was used to pay various drilling and geological companies. The last entry in the ledger kept by the Wingens for Oleander was dated 1992. The testimony at trial indicated that Mamian and the Wingens shared the cost of soil testing and so on. To speed up the payment process, Mamian or Mr. Wingen would advance funds to pay contractors, then reimburse each other. Mamian testified, "Bill [Wingen] and I had an understanding that I would advance the money personally and/or Bill would advance it and then we would reimburse each other . . . ."

In November 1995, the state of Nevada permanently revoked Oleander's corporate status due to its failure to file an annual list of officers and directors, to designate a resident agent, and to pay a filing fee. Mamian was unaware that Oleander was defunct. Mamian attempted to revive the corporation in 2003, but was unable to do so because the corporate name was taken by Mrs. Wingen's son, appellant Clayton Baker.

Activities Undertaken Pursuant to the Agreement

After signing the Agreement, Mamian went forward and attempted to develop the Property, putting money into drilling and other things, for a period of over 14 years. During this period, he understood that all "soft costs" (plans, permits, geological testing, architectural and engineering fees) would be divided fifty-fifty; however, this division of costs only kicks in if Nawn cancels the Agreement. In any event, it appears that Mamian and Mr. Wingen paid equally for the costs as they were incurred.

Mamian testified that "I was going to get approval from the City of Los Angeles and I was going to build two houses there, one for Nawn Corporation and one for the Wingens. And later on this was going to be transferred, after it was build [*sic*], under Oleander Corporation. One property was going to be transferred to Nawn and one would [*sic*] the Wingens." Mamian put, in his words, "tremendous time and money into this project." Neither Mamian nor Mr. Wingen planned to build their "dream homes" on the Property: "[F]or both of us [it] was an investment," Mamian testified. It was not clear who would live in the house that was to be built on the Wingens' lot.

Mamian testified that the geological studies done on the Property increased its value because the work determines whether the lots are buildable. He spent $65,672.62

on the attempted development, not including the value of his time. Plus, he purchased lots 6 and 7, next to the Property, to increase the likelihood of developing lots 4 and 5. The idea behind owning all four adjoining lots was to be able to sink enough caissons to support the entire hillside.

Mamian never got city approval to develop the Property. The city raised the "factor of safety" for supporting the upslope landowners above the Property from 1.35 to 1.5. Mamian testified that you cannot put enough caissons in lots 4 and 5 to support the entire hillside while providing a 1.5 factor of safety. Nevertheless, Mamian still believes that the Property could receive approval to build homes, even though the city refused his request to reduce the safety factor back to 1.35 and he admitted that "You cannot provide a 1.5 factor of safety." Nawn did not cancel the Agreement at any time.

Mr. Wingen Dies and Attempts Are Made to Sell the Property

William Wingen died in April 2003, after suffering from Alzheimer's disease. Five days later, Kathleen Wingen suffered a stroke. At Mrs. Wingen's request, her son, Clayton Baker, began liquidating the Wingens' assets. Baker listed the Property for sale, with Kathleen Winger as the owner. Mrs. Wingen did not tell Baker that Mamian should be informed about the sale.

Baker accepted an offer of $700,000 for the Property and an escrow was opened. During a title search, it was discovered that a lis pendens was placed on the Property in connection with Gary Mamian's divorce. The sale was halted until title could be cleared. At the time of trial, the Property was valued at $800,000 for the two lots.

Baker learned that Oleander's corporate status was permanently revoked by the state of Nevada. On the advice of counsel, Baker formed a new corporation, also named Oleander (Oleander 2) in 2003. The purpose of creating Oleander 2 was to prevent Mamian from reviving the original Oleander.

PROCEDURAL HISTORY

In May 2004, Kathleen Wingen filed suit to quiet title to the Property, and to impose a constructive trust. The basis for the suit was that the Wingens were defrauded into conveying their ownership interest in the Property to Oleander, which is defunct.

The named defendants were Oleander Corporation and all persons claiming any interest in the Property. The complaint was amended to add a cause of action to cancel the deed conveying the Wingens' interest to Oleander. The main action seeks the return of both lots to Mrs. Wingen.

Though not specifically named in the lawsuit, Gary Mamian and his wife filed a cross-complaint. In February 2005, the trial court struck the Mamians' cross-complaint without leave to amend. The court found that the Agreement lists Gary Mamian only as president of Nawn. The court wrote, "Whether Mamian is an officer or shareholder, or even President and sole shareholder of Nawn, is irrelevant. A corporation exists as an independent entity, separate from its officers and shareholders. Therefore, it is obvious that Gary Mamian, an individual, has no claim to the property." For the same reasons, the court struck the Mamians' answer to the complaint.

In February 2005, Nawn Corporation filed an answer to the complaint, as a person claiming an interest in the Property. The trial court took judicial notice that the state of Nevada revoked the corporate status of Nawn Corporation in 2006. As a result, the court found, Nawn Corporation lacks the capacity to sue or defend itself. The court granted a motion to strike the answer of Nawn Corporation.

In July 2005, an answer and cross-complaint were filed by Nawn, a Nevada Corporation. Nawn's cross-complaint alleged a breach of contract, breach of fiduciary duty, bad faith, unjust enrichment, to reform the deed and declaratory relief. Nawn claims a one-half undivided ownership interest and a partnership interest in the Property. Baker's answer to Nawn's cross-complaint pleads that Nawn "lacks the capacity to bring and maintain this action for the reason that it has not alleged that it has, and in fact it does not have, a contractor's license as required by Section 7028 of the California Business and Professions Code and the written agreement . . . is therefore illegal and void."

While the litigation was pending, Kathleen Wingen died. Appellant Baker was appointed as the executor of Mrs. Wingen's estate in November 2005. As the decedent's personal representative, Baker was entitled to continue this action and the court substituted him in as plaintiff.

Undeterred by the trial court's prior ruling that he has no claim to the Property, Mamian filed a new action against Baker in April 2006, alleging the same causes of action that were in his stricken cross-complaint. In his answer, Baker pleaded (among other things) that Mamian's new action is barred by principles of res judicata, due to the finality of the order striking Mamian's cross-complaint on the ground that he, as an individual, has no claim to the Property. Moreover, Mamian's new complaint was prematurely filed before he made a claim against Mrs. Wingen's estate. Further, Mamian did not allege that he has a contractor's license. The trial court consolidated Mamian's new action with Baker's pending case.

Baker filed a cross-cross-complaint against Nawn and Mamian alleging nine causes of action (breach of contract, fraud and misrepresentation, constructive trust, bad faith, intentional and negligent infliction of emotional distress, and elder abuse). Eventually, Baker dismissed all claims in the cross-cross-complaint except the cause of action for imposition of a constructive trust.

Baker filed a motion in limine, seeking to abate the cross-complaints of Nawn Corporation and Nawn, on the grounds that neither of these Nevada corporations was qualified to do business in California and were prohibited from maintaining cross-complaints in this state. The motion was granted as to Nawn Corporation and denied as to Nawn, which according to counsel, "has now been qualified in the state of California to do business."

THE TRIAL COURT'S RULING

The trial was bifurcated, with the court trying the equitable claims first. The court issued its statement of decision on April 23, 2007. The court found that the contracting party is Nawn, because Nawn Corporation did not exist at the time of contracting and "a non-existent corporation cannot enter a contract." The court read the cancellation clause of the Agreement ("all expen[s]es or profits reali[z]ed on the development of these two lots shall be divided by both parties on the basis of 50/50") to mean a division *of the proceeds from the sale* of the lots, not development on them. The court determined that the passage of 17 years since the Agreement was entered is not indicative of an

abandonment of the Agreement or a failure to perform because the evidence showed that property development in the Castellammare Tract was a long and challenging endeavor. The court also determined that Baker acted with unclean hands by forming Oleander 2 without notifying Mamian. Thus, the court declined to quiet title in favor of Baker.

The court rejected Baker's argument that the Agreement is illegal because Nawn is not a licensed contractor. It wrote, "It does not matter whether the party agreeing to have the property developed is a licensed contractor. The contract and the performance of work are separate." The court found no fraud on Nawn's part and no reason to impose a constructive trust. The court declared that the Property must be sold because lots 4 and 5 were not developed and the profits from the sale must be equally divided between the parties. The court found that Nawn is the prevailing party. Judgment was entered on July 11, 2007. The court later awarded Nawn contractual attorney fees. Baker's motion to vacate the judgment was denied. Appeal is taken from the judgment and from the postjudgment order awarding attorney fees.

DISCUSSION

1. Absence of a Contractor's License

Appellant contends that the Purchase and Construction Agreement is illegal and unenforceable because Nawn lacks a contractor's license. The issue was raised in Baker's answer to the cross-complaint, in which he pleaded that Nawn cannot maintain any claim and the entire Agreement is illegal and unenforceable because the corporation lacks a contractor's license. The issue was argued in the parties' closing briefs at the end of trial. Baker pointed out that Nawn produced no proof of licensure at trial. Nawn did not argue that it has a contractor's license. Instead, it argued that it was entitled to hire a contractor like Mamian to do construction.

a. Illegal Contracts Are Unenforceable

The "well-settled rule [is] that the courts will not aid a party whose claim for relief rests on an illegal transaction." (*Wong v. Tenneco, Inc.* (1985) 39 Cal.3d 126, 135.) Despite any "possible injustice" that may arise, "this consideration is outweighed by the importance of deterring illegal conduct." (*Lewis & Queen v. N.M. Ball Sons* (1957) 48

Cal.2d 141, 150.) If any part of the consideration for a contract is unlawful, the entire contract is void. (Civ. Code, § 1608.) The illegality of a contract presents "'"a question of law to be determined from the circumstances of each particular case."'" (*Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118 Cal.App.4th 531, 540.)

b. Overview of Contractor Licensing Laws

California has strict licensing laws for contractors. (Bus. & Prof. Code, § 7000 et seq.)[2] "'Contractor' . . . is synonymous with 'builder' and . . . a contractor is any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct . . . any building . . . or other structure, project, development or improvement, or to do any part thereof . . . ." (§ 7026.) A person erecting a building on his *own* property is not a "contractor." (*People v. Moss* (1939) 33 Cal.App.2d Supp. 763, 765-766.)

Applicants for a contractor's license must demonstrate knowledge of state building, safety, health and lien laws, in addition to showing knowledge and experience in the construction field. (§ 7068, subd. (a).) Corporations qualify for a contractor's license through "a responsible managing officer or responsible managing employee who is qualified for the same license classification . . . ." (§ 7068, subd. (b)(3).) A construction agreement with an unlicensed contractor is an illegal contract. (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1453.)

An unlicensed contractor may not "bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract for which a license in required . . . ." (§ 7031, subd. (a).) A contractor must be "duly licensed . . . *at all times* during the performance of [the] . . . contract." (*Ibid.*, italics added.) The penalty for failing to maintain proper licensure is "strict and harsh." (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works*

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[2] All further statutory references in this opinion are to the Business and Professions Code, unless otherwise indicated.

Co., Inc. (2005) 36 Cal.4th 412, 418.) The courts "withhold[] judicial aid from those who seek compensation for unlicensed contract work," "despite injustice to the unlicensed contractor." (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995; *Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 380.) It is clear that "the courts may not resort to equitable considerations in defiance of" the contractor's licensing laws. (*Lewis & Queen v. N.M. Ball Sons, supra*, 48 Cal.2d at p. 152.)

c. Nawn Cannot Enforce the Agreement

Under the terms of the Agreement, the Wingens agreed to sell lot 5 to Nawn. As consideration, Nawn "agrees to build a + 3190 sq. feet house as per attached plans" on the Property. The bargain was that Nawn would build the Wingens a house on lot 4, and Nawn would get lot 5 (plus $75,000) from the Wingens. Nawn's role in the Agreement is that of a "contractor," i.e., a builder "who undertakes to or offers to undertake to, or purports to have the capacity to undertake to . . . [itself] or by or through others" construct a house or otherwise improve and develop the Property. (§ 7026.)

Nawn is not a licensed state contractor. Although Nawn's president, Gary Mamian, testified that he is a licensed contractor, Mamian is not the contracting party, a point that the trial court made when it struck Mamian's cross-complaint. The trial court found that "it is obvious that Gary Mamian, an individual, has no claim to the property." The Agreement is between Nawn and the Wingens. Nawn produced no proof of licensure when a controversy arose over it, as required by statute. The burden to prove licensure, when it is a controverted issue, is on the licensee.[3] (*Great West Contractors, Inc. v. WSS Industrial Construction, Inc.* (2008) 162 Cal.App.4th 581, 588.)

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[3] "If licensure or proper licensure is controverted, then proof of licensure pursuant to this section shall be made by production of a verified certificate of licensure from the Contractors' State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action. Nothing in this subdivision shall require any person or entity controverting licensure or proper licensure to produce a verified certificate. When licensure or proper licensure is controverted, the burden of

Nawn argues that it was absolved of the need to obtain a contractor's license because the Wingens and Mamian formed Oleander. The Wingens transferred title to the Property to Oleander. Development of the Property was funded by contributions by Mamian and the Wingens. Because Mamian owns half of the shares in Oleander, he argues that any work done on the Property did not require a contractor's license.

Respondents are mistaken. Nawn--not Oleander or Mamian--was contractually bound to build a house on lot 4, subject to Los Angeles Building Department approval. Nawn is not a shareholder of Oleander. Instead, the Wingens and Mamian are the sole shareholders. Nawn is not the "owner" of the Property, and Oleander is not a signatory to the Agreement. The Contractors' State License Law exempts from licensing requirements "[an] owner of property, building or improving structures thereon, or appurtenances thereto, who contracts for such a project with a subcontractor or subcontractors licensed pursuant to this chapter." (§ 7044, subd. (b).) Under the terms of the Agreement, Nawn is acting as a general contractor and builder that would acquire title to lot 5 "upon completion of the projects . . ." as stated in the Agreement. The development project was never completed and no house was ever built; therefore, Nawn did not take title to lot 5.

The evidence shows that for a few years, Oleander paid bills associated with Nawn's plan to construct houses on the Property. Later, Mamian and Mr. Wingen paid the bills themselves and reimbursed each other. Mamian testified that the purpose of forming Oleander was to avoid personal liability if someone was injured on the Property during the development process. Oleander served as a funding and liability-avoidance mechanism and as a parking spot for title to the Property, until Nawn built the two houses. At that point, title would pass to Nawn and the Wingens. Nothing in the Agreement suggests that Oleander was acting as general contractor. This is a "purchase

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proof to establish licensure or proper licensure shall be on the licensee." (§ 7031, subd. (d).)

and construction agreement" between Nawn and the Wingens, and the only construction contractor identified in the Agreement is Nawn.

Nawn's brief states that the Wingens' house on lot 4 "could be built by Nawn, a Nevada Corporation with a Registered contractor as the [responsible managing employee] at the time it was actually to be built." What this means is that at the time it contracted to develop the Property and build a house, Nawn was not licensed, though it intended to acquire such a license at some point in the future, presumably with Gary Mamian as its responsible managing employee. A corporation that is not licensed to perform construction work cannot maintain a legal or equitable action unless it was "duly licensed . . . *at all times* during the performance of [the] act or contract, regardless of the merits of the cause of action . . . ." (Italics added.) (§ 7031, subd. (a); *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc., supra,* 36 Cal.4th at p. 418.)

Nawn could not contract to build the Wingens a house on the Property, and begin development work with geoengineers to achieve that contractual obligation, without first obtaining a license. The trial court found that "Mamian in behalf of Nawn, [has] made ongoing efforts to develop lots 4 and 5 over the 17 years since execution of the Agreement." "'The California courts have [ ] long held that those who enter into construction contracts must be licensed, even when they themselves do not do the actual work under the contract.'" (*Great West Contractors, Inc. v. WSS Industrial Construction, Inc., supra,* 162 Cal.App.4th at p. 593; § 7026.) It is immaterial that Nawn used licensed contractors in its ongoing efforts to develop the Property: without having a valid license itself before beginning its performance of the contract, Nawn cannot recover in law or in equity on the Agreement. Because Nawn cannot enforce the Agreement, the equitable issue of Baker's unclean hands in forming Oleander 2 is irrelevant. "[T]he courts may not resort to equitable considerations" in favor of an unlicensed contractor, in defiance of the Contractors' State License Law. (*Lewis & Queen v. N.M. Ball Sons, supra,* 48 Cal.2d at p. 152; *Great West Contractors, Inc. v. WSS Industrial Construction, Inc., supra,* 162 Cal.App.4th at p. 587.)

2. <u>The Trial Court Rewrote the Agreement</u>

Even if we were to overlook Nawn's failure to obtain a California contractor's license before entering a contract to build a house for the Wingens, the result in this case is inequitable because the trial court liberally rewrote the terms of the Agreement. We construe the terms of a written instrument from the instrument itself. Where there is no conflicting extrinsic evidence, the reviewing court must independently interpret the document. (*Brown v. Labow* (2007) 157 Cal.App.4th 795, 812.) There was no evidence presented as to what the parties meant by the terms that they used in the Agreement.

The trial court implemented the cancellation clause of the Agreement. We agree that the Agreement must end. Nearly 20 years have passed, no houses have been built on the Property, and the parties obviously can no longer work together. The aim of the Agreement has been thwarted and it is time to move on.

The problem is in the trial court's interpretation of the cancellation clause. The court found that the clause is "ambiguous." "An ambiguity arises when language is reasonably susceptible of more than one application to material facts." (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391.) Extrinsic evidence may be used to explain the meaning of a written instrument, even one that appears to be plain and unambiguous on its face (*Ibid*.) The trial court pointed to no extrinsic evidence relevant to prove something other than the plain meaning of the language used in the Agreement, and we found no such evidence in the record.

The cancellation clause provides that if "development of these two lots 4 and 5 [is] economically or otherwise unfeasible by the buyer, at that time all expen[s]es or profits reali[z]ed on the development of these two lots shall be divided by both parties on the basis of 50/50 . . . ." The language of the Agreement does not support the trial court's decision to rewrite the terms of the cancellation clause to state that the parties agreed to divide the proceeds from the sale of the Property 50/50. The Agreement makes no mention of "selling" the Property or dividing the "proceeds." It only mentions dividing "expenses and profits realized on the development of these two lots."

The reasonable and fair interpretation of this clause is that if only one of the two lots proved to be buildable or economically feasible to develop, the parties would divide the profits and expenses of the development endeavor 50/50. Without this division, only Nawn or only the Wingens would get a benefit from the development of the Property, because there would only be one house instead of the two houses specified in the Agreement. If the Agreement terminates because no houses could be constructed on either of the two lots, the parties would return to the status quo, with the Wingens having ownership of empty lots 4 and 5, and Nawn out of the picture, having participated in half of the exploratory costs of the development endeavor.

It is manifestly unreasonable to conclude that Nawn is entitled to receive the value of lot 5 even if *no* house was built on either lot 4 or 5. Nawn paid no money to enter this transaction. If all went as planned, and the two houses were built, Nawn would have a valuable ocean-view house across the street from the beach, plus $75,000 in cash from the Wingens. This was a no-money-down, million-dollar spec-house deal for Nawn, and Nawn was prepared to take the risk of failure to achieve this deal. For whatever reasons (soil instability, hostile neighbors, unachievable city safety factors, etc.) the deal failed: no houses were built. It is absurd to say that Nawn should receive the same reward for failure as it would have received for success.

3. <u>Attorney Fees</u>

The trial court awarded attorney fees to Nawn, as the prevailing party in the litigation. (Civ. Code, § 1717.) We have concluded that (a) Nawn cannot maintain an action in law or in equity because it contracted to build a house in Los Angeles without having a valid California contractor's license; and (b) even if Nawn were not required to have a contractor's license, the trial court misinterpreted the Agreement by requiring the Property to be sold and awarding Nawn half of the proceeds from the sale. Appellant Baker is now the prevailing party in this litigation.

The case is remanded to the trial court to address the amount of attorney fees to be awarded to Baker for all litigation occurring in the trial court and for the fees incurred in this appeal.

DISPOSITION

The judgment is reversed. The postjudgment order awarding attorney fees is reversed. The case is remanded to the trial court for further proceedings to address the issue of attorney fees to be awarded to Baker, as the prevailing party. Baker is awarded his attorney fees and costs for this appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.